United Nations A/C.6/52/SR.22

General Assembly
Fifty-second session

Official Records

Distr.: General
1 December 1997
English
Original: French

Sixth Committee

Summary record of the 22nd meeting
Held at Headquarters, New York, on Wednesday, 5 November 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

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The meeting was called to order at 3.10 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Mr. Yamada** (Japan) said that his delegation was in general agreement with the Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties, as outlined in paragraph 157 of its report (A/52/10). With regard to the unity or diversity of the reservations regime, it agreed with the Commission that the legal regime of the Vienna Conventions satisfied the requirements of all categories of treaties, including human rights treaties, and that, where they were silent, the Vienna rules applied.

2. Concerning the role of the monitoring bodies of normative treaties, he said that they could, in the exercise of their monitoring functions, make comments and recommendations concerning the validity of reservations by States; however, they did not have the right to decide on admissibility unless they had been specifically authorized to do so. The basic rule of consent by States must be respected.

3. Nonetheless, the practical problems of inadmissible reservations which Japan had already foreseen at the time of the Vienna Diplomatic Conference in 1968, must still be resolved. In that area, the "object and purpose" concept was the criterion for admissibility. However, regardless of the definition given to that criterion, it could always be invoked indiscriminately by reserving States and objecting States in order to justify their positions. The solution proposed at the time by Japan, with the support of other countries, had been to establish a collegiate decision mechanism to conduct the compatibility test of reservations. As there had been no consensus on the proposal, it had not been adopted at the time. Perhaps the International Law Commission could develop a mechanism based on that model, which would apply only to the compatibility of reservations and not the determination of their legal effect, which would continue to be left exclusively to the will of States.

4. **Mr. Kak Soo Shin** (Republic of Korea) supported the approach taken by the Special Rapporteur to the question of reservations to treaties with a view to supplementing and elucidating the Vienna regime, which struck a balance between the freedom of States and the unity of treaties but nonetheless had lacunae and ambiguities. Concerning the form to be given to the results of the Commission's work, his delegation was in favour of elaborating a binding document (and not a guide, which, while useful in practice, would be merely recommendatory) in the interest of the stability of treaty relations, one of the major sources of international law. That would also eliminate lacunae and ambiguities from the Vienna regime, which the Committee had been instructed to address. Nonetheless, the form of the document adopted would depend on the outcome of the Commission's work.

5. The Commission should, on a priority basis, establish rules concerning inadmissible reservations on which the Vienna Conventions were silent. While the object and purpose criterion undoubtedly contributed to the flexibility of the Vienna regime, one might well wonder who was empowered in practice to decide on the admissibility of reservations, and that uncertainty undermined the stability and reliability of treaties. A State making a reservation could claim to be a party to a treaty as long as its reservation had not been ruled inadmissible as a result of either an objection raised by a State or third-party arbitration. The Commission must therefore define new procedural rules in that regard. Parallel to the existing decentralized mechanism for objections, there should be a centralized system which would take uniform and timely decisions on the admissibility of reservations and, like multilateral treaties, would depend, first and foremost, on the will and collective decision-making power of States parties. A limited role might be given to the depository, which could be empowered to make recommendations on which States would then take a final decision.

6. The Commission should also make a distinction between interpretative declarations and reservations. The effect of interpretative declarations was different from that of reservations, which were sometimes prohibited by treaties in order to preserve their integrity. Such a distinction was therefore important in order to eliminate potential ambiguity in that newly emerging realm of international law.

7. Concerning the unity or diversity of the reservations regime, his delegation believed that the Commission should not hesitate to derogate from the unity rule if certain types of multilateral treaties genuinely required special treatment, for which, moreover, the Vienna Convention made provision. Nonetheless, great care must be taken before venturing into that field, since multilateral treaties, particularly human rights treaties and those codifying customary international law, required uniform application.

8. Concerning the Commission's Conclusions on reservations, he said that it was entirely appropriate that they should be nothing more than preliminary, since the question was being debated in other forums, whose opinions should

be taken into account by the Commission if it wished to contribute to making practice uniform in that area. His delegation supported the overall thrust of the Conclusions, which sought to balance the preponderance of State consent in the reservations regime and the efficient functioning of monitoring bodies. That was particularly relevant during the post-cold-war era, when it was vital to ensure the universal and uniform application of human rights treaties.

9. Nonetheless, the concept of a normative treaty, which was not very clear, must be made more specific. It might seem at first that all treaties were normative. In order to define the scope of its Conclusions more explicitly, the Commission should therefore agree on a more specific definition of "normative", illustrated by a list of examples, or else confine its Conclusions to human rights treaties.

10. His delegation supported an expanded role for monitoring bodies provided that they did not take responsibility for making recommendations on the admissibility of reservations unless they did so within the context of their duties, and that their findings were subject to the approval of States parties. The responsibility for taking action on an inadmissible reservation should rest with the reserving State. Placing paragraph 8 after paragraph 5 would reduce the risks of possible ultra vires activities of monitoring bodies by limiting the legal force of their findings. Paragraph 9 was unsatisfactory because if monitoring bodies were granted the competence to determine the admissibility of reservations States would be obligated to comply with their determination. For that reason, any reference to the determination should be deleted.

11. As to paragraph 12, which excluded monitoring bodies within regional contexts from the preliminary conclusions, the criterion should not be whether the character of the instrument was regional or universal, but what type of mandate a monitoring body had. Monitoring bodies with a clear mandate to appreciate or determine the admissibility of a reservation should be excluded.

12. **Mr. Odoi-Anim** (Ghana) said that the inherent weaknesses in the Vienna regime and the necessity for a uniform and consistent system in the area of reservations to treaties had prompted the work of the Commission on that subject. He emphasized that his delegation was not suggesting the rejection of the existing regime but its refinement and expansion, as the Commission had proposed in chapter V of its report (A/52/10, paras. 62 and 63), to make it more responsive to the needs of the international community. His delegation fully endorsed preliminary conclusions Nos. 1, 2, 3 and 6. Whatever the result of the debate on that issue, he hoped that it would be free of partisanship, so that the preliminary conclusions could be accepted by the international community as a whole.

13. Concerning the Vienna regime and the politically sensitive subject of human rights treaties, it was not surprising that the proliferation of that type of treaty had led to calls for a specific regime, in the light of the ambiguities in the Vienna regime. However, that solution would not be a viable option in practice, insofar as the existing general regime had proved that it could accommodate change and could be rendered more flexible. Conferring additional powers on the human rights treaty monitoring bodies, which were becoming more numerous, would only serve to complicate matters and worsen the already existing confusion in the current regime. Moreover, establishing a separate reservations regime for human rights could accelerate calls for similar treatment in respect of other subjects, which would be counter-productive for clarity and consistency, an objective of the international community.

14. Ghana fully endorsed the view expressed by the Commission in paragraph 76, subparagraphs (a) and (b), of its report, concerning the universality of the Vienna regime and its application to human rights treaties. The majority of human rights treaties concluded in the aftermath of the Vienna Conventions contained clauses on reservations making reference to the Vienna Conventions, strengthening his delegation's view that there was no need for a separate regime for human rights treaties. The proposals contained in paragraph 77, subparagraphs (a) and (b), of the report merited detailed study, and he urged the Commission to give the matter further consideration.

15. The role of monitoring bodies with respect to reservations remained to be clearly defined. As pointed out in the report of the Commission, the solution of giving regional bodies binding powers could not be transposed to a global level, given the significant differences in attitudes among countries. In his view, a system based on collaboration between States and monitoring bodies within an expanded framework of the Vienna regime would be a workable solution. The proposal that the Commission, the monitoring bodies and the General Assembly should hold consultations before deciding on the question raised in paragraph 126 of the report was interesting and deserved to be examined further.

16. **Mr. Diaz** (Costa Rica) expressed doubt about the form the Commission had given to its preliminary conclusions on reservations to treaties: an expert body would be unable to impose criteria on States without first having examined in detail all the elements of the legal system in question. Since they were only preliminary, he hoped that the conclusions

would be amended as necessary in order to take into account the views of States. On the other hand, his delegation was pleased that the Commission had not taken it upon itself to adopt a resolution directly that would have had no value and would even have run counter to its mandate, since it could only conduct its work in the progressive development and codification of international law in close cooperation with States.

17. With regard to conclusion No. 1, which he fully endorsed, the real question it raised was who should apply the Vienna regime and how, with the objective of striking a balance between the universality and the integrity of treaties. He also wondered about "the object and purpose of the treaty", human rights treaties in particular, and how reservations to such instruments should be interpreted. He hoped that the Commission would be able to respond to those questions.

18. On the other hand, his delegation could not accept conclusion No. 2 because it did not believe that the Vienna regime achieved a satisfactory balance between the objectives of preservation of integrity and universality. As the great number of sometimes inadmissible reservations entered by States with respect to some treaties, particularly human rights treaties, attested, the current regime favoured universality at the expense of integrity. Costa Rica shared the sense of frustration and dissatisfaction on that point of the monitoring bodies established by those treaties. It did not agree with the Commission (conclusion No. 3) that, in the absence of a regime better adapted to the requirements of human rights treaties, the existing regime should be applied.

19. His delegation also endorsed conclusions Nos. 5 and 8 whereby, taking into account the evolution of international law, the treaty monitoring bodies, in order to fulfil their monitoring function, should define the obligations of States parties and make recommendations on the effects of reservations on those obligations. Thus, they needed the ability to make recommendations. As to the measures that the monitoring body should take with respect to a reservation which it considered contrary to the object and purpose of the treaty, it was regrettable that, in the current state of international law, those bodies could not disregard the reservation and consider the reserving State bound by the treaty as a whole. Nor was it certain that the actions of some States which objected to a reservation, and which considered that the treaty should apply in its entirety to their country and to the reserving State, were well founded. For that reason, a monitoring body must be able not only to bring the reservation to the attention of States, but to declare itself unable to consider the reserving State a party to the treaty. Therefore, Costa Rica did not agree with conclusion No. 10, which provided that States parties and monitoring bodies were required to accept that it was the responsibility of the reserving State to act on an inadmissible reservation, which was in apparent conformity with conclusion No. 6. But it agreed with conclusion No. 12, which respected the will of States to confer powers on monitoring bodies in regional contexts.

20. Despite the dissatisfaction caused by the many reservations entered by States parties with respect to such major treaties as the Convention on the Rights of the Child, Costa Rica had thus far refrained from raising objections, since it doubted that they would be very useful in the current circumstances. It would welcome the views of the Commission on that matter.

21. In conclusion, he wished to refer to the problem of States which, on the one hand, expressed a desire to be parties to a treaty and, on the other, formulated, out of ignorance or bad faith, reservations which were deemed to be inadmissible. That paradox could be avoided by following the practice of the Inter-American Court of Human Rights, which had opted for a restrictive interpretation both of the object and purpose of the Convention whose application it monitored and of the reservations which had been made to it, thereby ensuring, where such reservations were deemed inadmissible, that it did not have to declare that the reserving State was not party to the treaty. It had thus been able to provide a measure of protection to persons whose rights were guaranteed by the Convention. Its example was therefore one to be followed.

22. **Ms. Fernandez de Gurmendi** (Argentina) said that she agreed with the contents of paragraph 1 of the Preliminary Conclusions, which stated that articles 19 to 23 of the Vienna Conventions governed the regime of reservations to treaties and that the object and purpose of the treaty was the most important element of the criteria. Nevertheless, while it was desirable to preserve the unity of the reservations regime, it must be recognized that that regime posed certain problems for human rights treaties.

23. One of the most controversial issues was that of the role of monitoring bodies. The Argentine delegation was of the view that it was not necessary to provide for the specific clauses mentioned in paragraph 7. Consequently, the opinion of the monitoring bodies could not be binding on the parties, since only States were competent to determine the admissibility of a reservation. In view of the importance of the matter, the Commission should prepare as early as possible a practical guide containing model clauses.

24. **Mr. Wenaweser** (Liechtenstein) said that he was grateful to the International Law Commission for reaffirming

the universality of the Vienna regime. He shared the view that the regime did not provide answers to all questions, particularly the question of the compatibility of certain reservations with the object and purpose of the treaty concerned. On the other hand, it was a flexible regime and better use should be made of that asset.

25. The application of human rights treaties was hampered by a number of reservations whose scope was unclear or which were contrary to the object and purpose of the treaties in question. The formulation of objections was a legitimate means of preserving the integrity of treaties, but often left questions open with regard to the admissibility of reservations. Liechtenstein therefore fully concurred with paragraph 5 of the Commission's Preliminary Conclusions (A/52/10, para. 157), which stated that treaty monitoring bodies were competent to comment upon the admissibility of reservations. There was need for a constructive dialogue between treaty monitoring bodies and States. Recommendations by monitoring bodies, however, could not be legally binding.

26. While it was worth considering, the Commission's suggestion to amend existing legal instruments in order to confer competence on the monitoring body to determine the admissibility of a reservation raised a number of practical difficulties and contradicted paragraph 5 of the Preliminary Conclusions. Furthermore, reserving States should engage in a dialogue not only with the relevant treaty monitoring body but also with the States which had lodged the objection.

27. With regard to its future work, his delegation would welcome the Commission's comments on the phrase "object or purpose", which was central to the deliberations. It also sought guidance on the distinction between reservations and interpretative declarations and on the effect of reservations deemed inadmissible.

28. **Mr. Tankoano** (Niger) noted that the 1969 Vienna Convention posed a number of difficulties for human rights treaties. Since such treaties were not based on the reciprocity regime, they should not fall within the scope of the Convention's application.

29. In principle, it was universally recognized that a reservation must be compatible with the object and purpose of the treaty in question. It should be recalled that the International Conference on Human Rights, held in Vienna in 1993, had called upon States to consider or review the scope of the reservations which they had entered and to consider, where necessary, removing them from the treaty in question.

30. International practice showed that States were becoming increasingly aware of the need to adopt a stricter interpretation of the admissibility of reservations. In any event, it was desirable that reservations to human rights treaties should be only temporary. They would thus allow the reserving State to take the necessary steps to satisfy its treaty obligations.

31. **Ms. Ladgham** (Tunisia), Special Rapporteur, said that there was no reason to apply a special regime to human rights treaties. In fact, reservations were a good means of ensuring their universality. It was true that the Vienna regime had certain lacunae, but since it was the fruit of a compromise, it could hardly be otherwise.

32. With regard to the role of treaty monitoring bodies, to which reference had been made in paragraphs 4 to 9 of the Commission's Preliminary Conclusions (A/52/10, para. 157), it should be noted that such bodies were not peculiar to human rights treaties. Moreover, it seemed hardly likely that they would exceed the scope of their mandate and determine the admissibility of reservations if the treaty in question did not so authorize them. States parties were the only judges of the admissibility of reservations. However, in paragraphs 7 and 9 of its Conclusions, the Commission had suggested providing specific clauses in normative multilateral treaties, including in particular human rights treaties, if States sought to confer competence on the monitoring body to determine the admissibility of a reservation. It also called upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they might make if such bodies were to be granted competence to that effect in the future. The Tunisian delegation was of the view that those Conclusions were premature, since the Commission was merely at the preliminary stage of its study and had not yet adopted a definitive position.

33. It should be recognized that the Vienna regime did not provide adequate guidance on the issue of objections. For example, when a State lodged an objection, it only rarely invoked the incompatibility of the reservation with the object or purpose of the treaty. As to whether unjustified objections or objections to admissible reservations should be allowed, the Tunisian delegation believed that they should not be. The Vienna regime, however, was silent on that point. The issue could be resolved only by using means for the peaceful settlement of disputes. In certain cases, however, objections could have major consequences for relations between States. Objecting States might, *inter alia*, decide that the treaty would not enter into force between itself and the reserving State. The Commission should therefore consider in greater detail the issue of objections with a view to clarifying the

Vienna regime. It could, for example, introduce a mechanism for monitoring the validity of objections.

34. **Mr. Correa** (Chile) noted that the formulation of a reservation was one of the expressions of a State's sovereignty and was in keeping with a general principle of customary international law that was recognized by the 1969 Vienna Convention.

35. The Vienna regime established a satisfactory balance between the need to preserve the integrity of treaties and the need to guarantee their universality. Its most salient features were: (a) the fact that States were free to make reservations; (b) the prohibition against making reservations that were contrary to the object or purpose of the treaty; (c) the right of States not to be affected by a reservation to which they objected; (d) the residual nature of the system.

36. Nevertheless, the regime suffered from certain lacunae. The difficulties caused by reservations that were contrary to the purpose or object of the treaty arose mainly because of the absence of any objective criteria, which left the door open to interpretations by States. The problem was particularly severe in the case of human rights treaties. It was difficult to reconcile the sovereignty of States (and thus their right to enter reservations) with the indivisible character of the obligations enunciated in that type of treaty. However that might be, States were the only judges of the admissibility of reservations. Monitoring bodies played a complementary role but could only give opinions or make recommendations. Their opinions could not be binding. Article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination offered a judicious solution to the problem of competence to determine the admissibility of reservations: it provided that a reservation should be considered incompatible if at least two thirds of the States parties objected to it. That solution had the advantage of permitting States Parties to participate in the process.

37. **Mr. Mohan Dev** (India) said that States alone were competent to determine their willingness to be bound by international contractual obligations and the extent to which they would do so. It was undoubtedly a sovereign attribute of every State to negotiate with other States concerning the decision to be taken in that regard. The formula in the 1969 Vienna Convention had reconciled two key requirements, on the one hand, ensuring that reservations were compatible with the object and purpose of any given treaty and, on the other hand, ensuring the wider acceptability of treaties by States. That flexibility applied to all treaties without any distinction and, in particular, to human rights treaties. Moreover, a clear-cut distinction could not be made between normative treaties and synallagmatic treaties.

38. Although his country was committed to the cause of human rights, including the right to development, it believed that legal instruments concerning such matters were governed by international law and that their formulation, interpretation and application were governed by the international law of treaties. The role of human rights monitoring bodies was to oversee the observance of those rights by States parties, and not to convert themselves into legislative bodies, let alone to change the applicable international law.

39. His delegation broadly agreed with the Preliminary Conclusions of the Commission contained in its report (A/52/10, para. 157). It encouraged the Commission to adopt a guide to practice in respect of reservations with model clauses consistent with the Vienna regime on the law of treaties, which was sound, flexible and applicable to all categories of treaties, including human rights treaties.

40. Some of the Preliminary Conclusions drawn by the Commission in respect of the competence of the monitoring bodies appeared to be off the subject. The competence of human rights bodies and the limits of such competence were essentially matters for States parties to determine. His delegation therefore did not accept paragraph 9 of the Commission's conclusions.

41. **Mrs. Telalian** (Greece) agreed with the International Law Commission that the Vienna regime was universally applicable, including to human rights treaties, even given the non-reciprocal nature of the obligations which the latter type contained. The regime on reservations was part of a system of collective guarantees which included not only supervisory bodies but also a right of supervision by each party with respect to the conduct of other parties. It was extremely useful.

42. As to the competence of supervisory bodies to determine the admissibility of reservations, her delegation endorsed paragraph 5 of the Preliminary Conclusions which, however, it felt was contradicted by paragraph 7 two paragraphs later.

43. Supervisory bodies of human rights treaties had the competence to provide an objective assessment of the compatibility of a reservation with the object and purpose of the treaty in question. That competence derived not only from the special character of human rights norms, but also, from the mandate of the bodies in question, which required the determination and clarification of the specific obligations assumed by States.

44. The question of the legal effect of the assessment made by supervisory bodies was crucial. For example, in the context of the European Convention on Human Rights, the Commission and the European Court of Human Rights had not hesitated to declare a reservation null and void, but the declaration had not gone so far as to affect the consent of the reserving States to be bound by the Convention. A different approach had been advocated by the International Court of Justice in 1951 in its advisory opinion relating to the Convention on the Prevention and Punishment of the Crime of Genocide. However, the European example was exceptional since the supervisory bodies of the European Convention were vested with judicial and quasi-judicial competencies, which was not the case with other bodies established by treaties. In that respect her delegation agreed with paragraph 8 of the Commission's conclusions to the effect that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations could not exceed that resulting from the powers given to them for the performance of their general monitoring role. However, it believed that the paragraph would be better placed immediately after paragraph 6, and should be renumbered paragraph 7.

45. With regard to paragraph 12, reference should be made to decision-making bodies within regional contexts along with monitoring bodies.

46. Within the context of the Vienna Conventions, it was of the utmost importance that the Commission shed some light on the problems relating to impermissible reservations. The Vienna system had been strongly criticized since it left it to individual States to determine the legal consequences of non-compliance with reservations. However, objecting States preferred to condone treaty relations with reserving States, even when their objection was based on the reservation's incompatibility with the spirit of the treaty.

47. Clarification of those issues would meet the concerns expressed by human rights monitoring bodies regarding the number and scope of existing reservations to the treaties they monitored. Such clarification also would help those bodies and States to determine whether parties to multilateral conventions were complying with their obligations.

48. Lastly, she said that the conclusions of the Special Rapporteur were premature. Conclusions should be drawn after an in-depth analysis of the various aspects of the issue of reservations.

49. **Mr. Pellet** (Chairman, International Law Commission), introducing chapters VI to X of the report of the International Law Commission on the work of its forty-ninth session (A/52/10), began by explaining the Commission's medium- and long-term programme of work, which were discussed in chapter X. A working group had been established to examine possible new topics for the Commission to study during the coming quinquennium, in keeping with its commitment made at its preceding session that it would be in a position to recommend new topics at the end of each quinquennium. The working group had enumerated a number of criteria which should guide the selection of new topics. The Commission hoped that at its next session it would be able to propose new topics and indicate how it intended to proceed with their consideration. Governments would have an opportunity to examine the suggestions and comment on them.

50. Chapter VI dealt with State responsibility. In 1996, the Commission had completed its first reading of the topic. The topic was a field of law which affected every aspect of State activities. The first draft of the articles by the Commission dealt with a number of critical issues and required the special attention of the Sixth Committee. For its second reading, scheduled to begin in 1998, the Commission needed to know the views of Governments.

51. The Commission had established a Working Group to consider how it should proceed with the topic. The Working Group had examined the areas where more work was required in the light of discussions following the adoption of the draft text on first reading and new developments since then. On the basis of the Working Group's recommendation, the Commission had drawn up its work programme for the quinquennium with a view to completing its second reading of the topic within that time-frame. It had also decided, after taking into account comments from Governments, to consider the character of the draft articles in 1999, if possible. It had appointed Mr. James Crawford as Special Rapporteur for the topic.

52. Of course, if the Commission's second reading of the topic was to be carried out effectively, comments of Governments were essential. He therefore appealed once more to Governments to comply with their part of the pact and provide their comments to the Commission in writing, as requested in 1996 both by the Commission and by the General Assembly itself on the proposal of the Sixth Committee. If States did not comply with the deadline of 1 January 1998, the new Special Rapporteur would not be able to take their comments into account. So far only two States had transmitted to the Secretariat their comments on the complete text of the draft articles.

53. Turning to chapter VII of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the Commission

had established another Working Group, which had reviewed the work on the topic since its introduction in 1978. The Working Group was of the view that the scope and content of the topic remained unclear, in particular because of such factors as conceptual and theoretical difficulties. The title of the topic was cumbersome, long, confused and ambiguous; and the relationship between the topic and State responsibility was not entirely clear. The Working Group had noted an additional difficulty connected with the fact that the Commission had attempted to deal with the two distinct issues of "prevention" and "liability" under the same topic. It had suggested that the two issues should in future be addressed separately and perhaps in succession.

54. The Working Group had noted that the Commission's work on "prevention" was already at an advanced stage and that it had provisionally adopted many of the draft articles on that area. It had suggested that the Commission should proceed with that aspect of the topic and should be able to complete it within the next few years. "International liability" was widely viewed as the core issue of the topic as originally conceived, and the Commission should retain that subject. But it needed to await further comments from Governments before making any decision. It must be remembered that a group of experts could not take the place of Governments.

55. On the basis of the recommendation of the Working Group, the Commission had decided to proceed with its work, focusing first on prevention under the subtitle "Prevention of transboundry damage from hazardous activities", and to appoint Mr. Rao as Special Rapporteur for that part of the topic. It had further decided to reiterate its request for comments from Governments on the issue of international liability, if they had not previously submitted them, in order to assist the Commission in finalizing its views. States should therefore express their views on that important issue as soon as possible.

56. With respect to chapter VIII of the report, on diplomatic protection, the Commission had mentioned in its report on its forty-eighth session (A/51/10) that it intended to include the topic of diplomatic protection on its agenda. In paragraph 13 of its resolution 51/160 the General Assembly had invited the Commission to examine the topic further and to indicate its scope and content in the light of the comments of the Sixth Committee. There again, the Commission had established a Working Group, whose report was contained in paragraphs 172 to 189 of the Commission's present report (A/52/10).

57. Given the increased trade between States, the question of claims by States on behalf of their nationals was of increasing interest. In addition, there was a large volume of State practice and an abundance of case law in that area. Moreover, with the growing diversity of the institutions involved in trade and other activities in other States, the diplomatic protection of legal persons had become complex and would benefit from clarification. In fact, the topic of diplomatic protection was one of the few areas of traditional international law which had not yet been subject to codification despite its relevance to the Commission's major work on international liability.

58. Endorsing the proposals of the Working Group, the Commission had attempted to clarify the scope of the topic and to identify issues which should be studied in the context of the topic. It had agreed that the work should follow the traditional pattern of draft articles and commentaries, but had left the question of its final form, for example a convention or guidelines, to be decided at a later date.

59. As the report indicated, the Commission's work on diplomatic protection would be limited only to the consequences of an internationally wrongful act which had caused an "indirect" injury to a State because of injury to its nationals. Thus the topic, like the draft articles on State responsibility, would be limited to codification of "secondary" rules. While positing the requirement of an internationally wrongful act of the State as a prerequisite, the Commission would not address the specific content of the international obligation which had been violated.

60. Important issues would have to be examined with regard to the nature of diplomatic protection, such as whether it was a right of an individual or might only be exercised at the discretion of a State. The question might even be raised as to whether the legal fiction on which diplomatic protection was based was still valid at the end of the twentieth century. That made the subject all the more interesting and the need to consider it all the more urgent.

61. Diplomatic protection dealt with at least four major areas. The first was what the Commission had called "the basis" for diplomatic protection. The issues involved in that part included the required legal linkage between an individual and a State as a prerequisite of espousal of claim, i.e. the question of nationality, including multiple nationality, the problem of statelessness, espousal claims of non-nationals, etc. That part would also have to address the question of the nationality of legal persons as well as the problem of the transferability of claims.

62. The second major area of diplomatic protection was concerned with the parties, i.e. the claimants and respondents or the question of who could claim diplomatic protection against whom. The outline proposed by the

Commission included international organizations although, as noted in paragraph 187, the Commission had not taken a definitive position on whether the topic should include protection exercised by international organizations for the benefit of their agents, i.e. functional protection. Taking into account the relationship between protection exercised by States and functional protection exercised by international organizations, the Commission had agreed that the latter subject should be studied at the initial stage of the work on the topic in order to enable it to decide whether to include it in the topic. Comments by Governments would be useful in that respect. Some Governments had already presented a number of comments at the beginning of the session.

63. The third major area dealt with the conditions under which diplomatic protection was exercised. The most important issue in that part was probably the exhaustion of local remedies. Other issues included proof of nationality, the "clean hands" rule, the impact of the availability of alternative international remedies, etc.

64. Finally, the fourth major area of the topic dealt with the consequences of diplomatic protection. Issues to be considered included submission to a jurisdiction to determine and liquidate claims, lump-sum settlements, the elimination or suspension of private rights, and the effects on settlements of subsequent discovery of mistake or fraud. The views of Governments on that outline and the main issues raised by that important topic would be extremely useful to the Commission, which had appointed Mr. Bennouna as Special Rapporteur.

65. As far as chapter IX, entitled "Unilateral acts of States", was concerned, the General Assembly, in its resolution 51/160, had requested further clarification on the scope and content of the topic. Again, in accordance with the working methods agreed upon at the previous session, the Commission had established a Working Group. The Working Group had found it useful to include the topic in the Commission's agenda for a number of reasons. First, in the international sphere, States frequently carried out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts was constantly growing as a result of the rapid political, economic and technological changes taking place in the international community and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States. Secondly, the practice of States in that field manifested itself in different forms. Thirdly, it would be in the interest of predictability and stability of international relations to clarify the functioning of such acts and their legal consequences.

66. The Commission intended to restrict the topic to those unilateral acts of States that were intended to produce legal effects by creating, recognizing, safeguarding or modifying rights, obligations or legal situations. The study of the topic should therefore rule out those State activities which did not have such legal consequences. The Commission had approved an outline comprising five chapters. He explained its contents as detailed in paragraph 210 of the Commission's report. The Commission had appointed Mr. Rodriguez-Cedeño as Special Rapporteur for the topic, and he would be submitting his first report in 1998. That report would contain a brief description of the practice of States with examples of the main types of unilateral legal acts and a survey of State practice in that area.

67. Since the topic dealt with acts of States, the Commission believed it was particularly important for Governments to make their opinions known, both in the Sixth Committee and separately in writing, and to provide as soon as possible information they considered relevant for the study of the topic: the importance, usefulness and value that each State attached to its own and others' unilateral legal acts in the international sphere; the practice and experience of each State in that regard; government documentation and judicial decisions that should be taken into account; opinions as to whether the final result of the Commission's work on the topic should be a doctrinal report, a list of recommendations or guidelines for the conduct of States or a set of draft articles; the degree of priority or urgency that States attached to that work; and any comments that Governments might have on the proposed outline.

68. **Mr. Benítez Sáenz** (Uruguay), referring first to chapter IV of the report, on nationality in relation to the succession of States, said that the Commission had been right to consider the case of natural persons first. Its work was satisfactory, especially since it reaffirmed the right to a nationality and upheld respect for the will of persons concerned, the notion of unity of a family and the principle of non-discrimination. Similarly, the fact that the criterion of habitual residence had been selected for the presumption of nationality would make it much easier to resolve the problems resulting from the succession of States.

69. His delegation would make its comments on the second part of the draft articles later. For the moment, it would simply endorse article 29.

70. Concerning chapter V, on reservations to treaties, while he endorsed paragraph 1 of the Commission's Preliminary Conclusions (para. 157), he believed that treaty-monitoring bodies could not themselves assume the exclusive competence of States to decide the extent to which

States wished to be bound by treaties; he therefore could not agree with paragraphs 5 and 7 of the conclusions.

71. The topic of State responsibility, dealt with in chapter VI, should remain on the Commission's agenda for the quinquennium. He would have preferred that the study on international liability for injurious consequences arising out of acts not prohibited by international law should begin not with prevention, but with the definition of the limits of the international liability of States in case of transboundary harm.

72. Specifically, his delegation endorsed draft article 4 which obliged States to take appropriate preventive measures. The provisions of draft article 10, on risk assessment, and article 13, on notification and information, flowed logically from a system which, while respecting the sovereignty of States, recognized that lawful activities could cause harm to other States.

73. With respect to diplomatic protection (chapter VIII), the Commission had taken a sound approach, particularly by endorsing the principle that domestic remedies must be exhausted before diplomatic protection came into play.

74. The Commission's approach to the issue of the unilateral acts of States (chapter IX) was also satisfactory. The topic's title should not prevent the Commission from analysing the consequences of acts carried out by more than one State. The outline for the study proposed by the Commission demonstrated the complexity of the topic, and his delegation was confident that the Commission had the expertise to provide the international community with the norms that it needed.

75. **Mr. Panevkin** (Russian Federation), turning first to the topic of reservations to treaties, said that the Commission's Preliminary Conclusions, particularly paragraphs 1, 2, 4 and 7, were of practical interest. They stressed that, in the absence of any express agreement, the human rights treaty monitoring bodies could not be considered competent to make comments or recommendations with regard to the admissibility of a reservation. It was all the more important that, as indicated in paragraph 7, specific clauses should be provided in normative multilateral treaties or that protocols to existing treaties should be elaborated if States sought to confer competence on the monitoring body for the performance of their general monitoring role.

76. With respect to the problem of appreciation of the admissibility of reservations, the Commission could establish general norms which would facilitate the settlement of legal disputes and provide guidance to States in complex legal situations. Such general principles would be supplementary and, rather than undermine the integrity of the Vienna regime, would remedy some of its lacunae. If they met with the approval of Governments and the monitoring bodies, they could prove very useful to States. His delegation therefore supported the Commission's intention to study the theory and practice of reservations to bilateral agreements and, in general, believed that the Commission should pursue its work on the topic.

77. He expressed appreciation for the considerable amount of work done by the Commission on nationality in relation to the succession of States (A/52/10, chap. IV), and recalled that it had said that nationality should be governed by national legislation within the limits set by international law, and to that end due account should be taken of both the legitimate interests of States and those of individuals. His delegation particularly supported article 4, concerning the presumption of nationality with retroactive effect on the date of succession as that presumption, reinforced by articles 20, 23 and 24 safeguarded the right to a nationality. It also supported article 10, on respect for the will of persons concerned.

78. However, some other aspects of the draft were less satisfactory, particularly articles 25 and 18, which authorized Governments to withdraw or not grant nationality. The draft as a whole did not attach enough importance to the issue of multiple nationality, which was a widespread phenomenon, in Europe in particular. It would be appropriate to draw inspiration from the European Convention on Nationality, which devoted several articles to the issue and contained interesting provisions on the withdrawal of nationality. The Russian delegation hoped also that the Commission would give greater prominence in its future work to the legal practice of the countries that had arisen out of the former USSR, because that was the region where most of the problems were.

79. In terms of the form the draft articles should take, his delegation favoured a text in the nature of a declaration, but would not oppose an instrument with binding force. The Commission should continue to examine the items on its agenda at its 1998 session, which should be held in two parts.

80. **Mr. Pfirter** (Observer for Switzerland) commended the Commission for its concern for and its willingness to contribute to the ongoing debate in other forums on reservations to multilateral normative treaties — particularly treaties on human rights — and noted that the topic had been renamed "Reservations to treaties". By adopting a position on the general problem of reservations, the Commission was

playing its full part as the body responsible for promoting the progressive development and codification of international law. By transforming the draft resolution submitted to it by the Special Rapporteur into preliminary conclusions, it had given the document a more appropriate form in the sense that, as the Special Rapporteur himself had said, it restated the main conclusions of his two reports.

81. The Commission's conclusions should remain preliminary until work on the subject of reservations was completed. The Special Rapporteur was to submit two new reports in 1998, and in principle the Commission was to adopt a guide to practice for States in respect of reservations. The work was therefore far from finished, and the preliminary conclusions would doubtless be re-examined, amended or refined; they would not be definitive until the process was over. Also, many States and international bodies had not yet responded to the Special Rapporteur's questionnaire. For Switzerland, responding to the questionnaire had been a way of officially expressing its support for the work of the Commission and of contributing to and facilitating its task.

82. The Commission's preliminary conclusions on reservations to treaties comprised 12 paragraphs of which the first three were not subject to discussion. Paragraph 4 introduced the issue of the role of monitoring bodies in respect of reservations, and it should perhaps be recalled that the depositaries of multilateral treaties had a number of tasks to perform whose importance should not be underestimated. In fact, under article 77, subparagraph 1 (d), of the Vienna Convention on the Law of Treaties, one of their functions was examining whether the signature or any instrument, notification or communication relating to the treaty was in due and proper form and, if necessary, bringing the matter to the attention of the State in question. There was a real duty for depositaries under that subparagraph that they must discharge for all instruments they received, including reservations.

83. Everyone recognized that the role of the depositary had been reduced to a purely administrative one. Some authors would even have it that their impartiality had been gradually transformed into irresponsibility. A depositary could not make judgements about the legal effects of the reservations States entered on signing a treaty or depositing the instrument expressing their consent to being bound by it. A depositary could not plead its duty of impartiality in order to play the simple role of intermediary. When called upon to examine whether legal acts were valid, a depositary should check whether the treaty to which reservation was being made ruled out the possibility of entering reservations with respect to it. If the prohibition on reservations applied only to certain articles, or, conversely, if reservations were authorized only for some provisions, the depositary must refuse such reservations as were not in accordance with the provisions of the treaty. When admissible reservations were formulated ambiguously, the depositary must transmit their terms only after receiving the necessary clarifications.

84. Paragraph 5 of the preliminary conclusions was somewhat peremptorily worded, and it might be asked whether it was for the Commission to lay down principles, and in particular whether it should confer competence on monitoring bodies when treaties were silent on the subject. Wording that gave the Commission more flexibility and better reflected the fact that all it intended to do was provide an opinion would have been preferable. Not only that; paragraph 5 contained a contradiction relative to the preliminary conclusion in paragraph 4, which stated that the establishment of monitoring bodies by many human rights treaties had given rise to legal questions that had not been envisaged at the time of the drafting of those treaties: it was not possible to claim in one breath that legal questions had not been envisaged when monitoring bodies had been established and that those bodies were competent in that regard.

85. The abruptness of the other provisions under consideration could also be criticized, with the exception of paragraph 11. There was no question that there had been an expansion of conventional monitoring bodies to an extent not provided for when they had been established. Very generally, it was for those bodies to ensure that the treaties they monitored were properly implemented. For them to do so, they had to have the necessary means. From that point of view, therefore, it might be judicious to recognize their competence, or attribute competence to them in assessing the admissibility of reservations. The monitoring they carried out in that connection, though, should not exceed the powers the States parties to a treaty recognized them as having or had conferred on them. In that connection, establishing a climate of close cooperation between the monitoring bodies in question and States would seem to be a determining factor, as would be complementarity between the monitoring each carried out with respect to the admissibility of reservations.

86. In any case, the competence of monitoring bodies in respect of reservations could not be evaluated except with reference to the instrument in question and dependent on the will of the States parties to it. Where States had not subscribed explicitly or implicitly to recognition of competence to a monitoring body or to attribution of competence to it in respect of reservations, it was doubtful whether the monitoring body could legitimately carry out

such a role: at the very most, it could deliver an opinion whose effects would be without legal force.

87. His delegation's concerns corresponded essentially to those the Commission had addressed in its preliminary conclusions. In so doing, the Commission had not restricted itself to expressing its opinion on the question of the role of monitoring bodies in respect of reservations, it had taken it upon itself to lay down principles and make recommendations to States. It seemed also to have given its conclusions a legal status and weight that it would be difficult to admit at the current stage in its work. It would have been preferable for the Commission to adopt an attitude of strict neutrality towards monitoring bodies, even if only to take their individual natures into account, and to express its conclusions in terms that did not run the risk of crystallizing positions that were not yet definitive.

The meeting rose at 6.10 p.m.